APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 6046

BENJAMIN W. COREY, *Defendant, Appellant,*

v.

UNITED STATES OF AMERICA, *Appellee.*

On Motion to Dismiss Appeal

Before WOODBURY, *Chief Judge,* and HARTIGAN, *Circuit Judge.*

Russell Morton Brown for appellant on memorandum.

W. Arthur Garrity, Jr., United States Attorney, and *Thomas P. O'Connor*, Assistant U. S. Attorney for appellee on motion to dismiss and memorandum.

Opinion of the Court
September 18, 1962

PER CURIAM. This is a motion by the United States to dismiss, as untimely, defendant-appellant's appeal from a judgment of conviction entered by the United States District Court for the District of Massachusetts.

Defendant was convicted as charged in the indictment of seventy-five offenses of making and presenting for payment to a department of the United States—the Department of the Army—false, fictitious and fraudulent claims in violation of 18 U.S.C. § 287. The maximum penalty for each offense is five years imprisonment or a fine of $10,000 or both.

On April 9, 1962, the district court entered a judgment of conviction against the defendant expressly noting that the judgment was entered pursuant to 18 U.S.C. § 4208(b). This statute empowers a court for a maximum period of

six months to modify a defendant's sentence without being restricted to sixty days, as provided by Rule 35, Federal Rules of Criminal Procedure. Following the April 9 judgment, defendant was placed in the custody of the Attorney General and committed by him to the United States Penitentiary at Lewisburg, Pennsylvania.

Thereafter, on July 17, 1962, again pursuant to 18 U.S.C. § 4208(b), the district court entered an Order On Probation, suspending sentence and placing the defendant on probation for a term of two years.

Defendant took no appeal from the April 9 judgment but has appealed the Order On Probation entered July 17, 1962. The United States Attorney's position is that the judgment of April 9, 1962, under § 4208(b), was a final appealable judgment and that defendant's right of appeal has been lost by failure to give notice of appeal within ten days thereof.

The defendant contends that under the April 9 judgment "No sentence whatever was pronounced. No punishment was imposed, ..." However, the district court expressly noted that it was acting under the provisions of Title 18, U.S.C. § 4208(b). Under this section the statute clearly states that the term of "commitment shall be deemed to be for the maximum sentence of imprisonment prescribed by law." Consequently, at this point the defendant was on notice as to the extent of his punishment. If he desired to appeal, this was the time that he should have acted. While it is true that defendant could reasonably assume that the judge would modify this maximum sentence, the judge was assuredly under no duty to do so. See *United States* v. *Behrens*, 190 F. Supp. 799 (D.C.S.D., Ind. 1961).

An order will be entered docketing the case and granting the motion to dismiss defendant's appeal.

Order of Court

September 18, 1962

Upon consideration of motion to dismiss appeal, memoranda in support thereof and in opposition thereto.

It is ordered that the appeal be, and the same hereby is, dismissed.

By the Court:

ROGER A. STINCHFIELD, Clerk.

By: /S/ DANA H. GALLUP
Chief Deputy Clerk

Order of Court

October 3, 1962

It is ordered that the petition for rehearing filed by appellant be, and the same hereby is, denied.

By the Court:

/S/ ROGER A. STINCHFIELD,
Clerk.

Rule 32, Federal Rules of Criminal Procedure

(b) Judgment. A judgment of conviction shall set forth the plea, the verdict or findings, and the adjudication and sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly. The judgment shall be signed by the judge and entered by the clerk.

Rule 35, Federal Rules of Criminal Procedure

The court may correct an illegal sentence at any time. The court may reduce a sentence within 60 days after the sentence is imposed, or within 60 days after receipt by the

court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 60 days after receipt of an order of the Supreme Court denying an application for a writ of certiorari.

Rule 37, Federal Rules of Criminal Procedure

(a)(2) Time for Taking Appeal. An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, but if a motion for a new trial or in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion. When a court after trial imposes sentence upon a defendant not represented by counsel, the defendant shall be advised of his right to appeal and if he so requests, the clerk shall prepare and file forthwith a notice of appeal on behalf of the defendant. An appeal by the government when authorized by statute may be taken within 30 days after entry of the judgment or order appealed from.

Rule 39, Federal Rules of Criminal Procedure

(a) Supervision in Appellate Court. The supervision and control of the proceedings on appeal shall be in the appellate court from the time the notice of appeal is filed with its clerk, except as otherwise provided in these rules. The appellate court may at any time entertain a motion to dismiss the appeal, or for directions to the district court, or to modify or vacate any order made by the district court or by any judge in relation to the prosecution of the appeal, including any order fixing or denying bail.

Rule 46, Federal Rules of Criminal Procedure

(a)(2) Upon Review. Bail may be allowed pending appeal or certiorari unless it appears that the appeal is frivolous or taken for delay. Pending appeal to a court of appeals, bail may be allowed by the trial judge, by the

court of appeals, or by any judge thereof or by the circuit justice, to run until final termination of the proceedings in all courts. Pending appeal or certiorari to the Supreme Court, bail may be allowed by the court of appeals or by any judge thereof or by the Supreme Court or by a Justice thereof. Any court or any judge or justice authorized to grant bail may at any time revoke the order admitting the defendant to bail.

Title 18, U. S. Code, Section 4208

(b) If the court desires more detailed information as a basis for determining the sentence to be imposed, the court may commit the defendant to the custody of the Attorney General, which commitment shall be deemed to be for the maximum sentence of imprisonment prescribed by law, for a study as described in subsection (c) hereof. The results of such study, together with any recommendations which the Director of the Bureau of Prisons believes would be helpful in determing the disposition of the case, shall be furnished to the court within three months unless the court grants time, not to exceed an additional three months, for further study. After receiving such reports and recommendations, the court may in its discretion: (1) Place the prisoner on probation as authorized by section 3651 of this title, or (2) affirm the sentence of imprisonment originally imposed, or reduce the sentence of imprisonment, and commit the offender under any applicable provision of law. The term of the sentence shall run from date of original commitment under this section.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Criminal No. 61-67-F

UNITED STATES

v.

BENJAMIN W. COREY

Notice of Appeal

Name and address of appellant:
Benjamin W. Corey
6 Winter Street
Cochituate, Massachusetts

Name and addres of appellant's attorneys:
Kargman and Kargman
11 Pemberton Square
Boston, Massachusetts

Russell Morton Brown
Brown, Goodpasture, & Block
Federal Bar Building
1815 H St., N. W.
Washington 6, D. C.

Offense: False claims against the Government, Title 18 U. S. Code Section 287.

Concise statement: Defendant was found guilty by jury of 75 counts and committed on April 9, 1962, to the custody of the Attorney General under Title 18 U. S. Code Section 4208(b).

On July 16, 1962, following report from the Bureau of Prisons, defendant was placed on probation for two years, and released from custody.

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the First Circuit from the above judgment of July 16, 1962.

BENJAMIN W. COREY, Appellant

by _____
RUSSELL MORTON BROWN,
Counsel

July 19, 1962

District Court Sentencing Procedure of July 16, 1962

(Monday, July 16, 1962
Boston, Massachusetts.)

The Clerk: 61-67-F, Criminal, United States against Benjamin W. Corey.

The Court: Now, Mr. Counsel, as you know as a result of our conferences in my lobby, this case comes back to me with the report concerning the defendant which I have studied and read, and now it is my duty to dispose of the case at this point, finally.

Under our rules, Mr. Corey, I have to inquire whether or not you have anything to say about the disposition of your case at this point.

The Defendant: I want to thank you very much, Your Honor, for according me the opportunity of saying something in behalf of myself, but I should rather leave it in the hands of my attorney.

The Court: You don't care to say anything, and you leave it to counsel.

We have discussed the matter fully for the last half-an-hour in my lobby. But I am compelled to ask you whether or not you wish to say anything in your own behalf before I impose the sentence I am going to impose. Do you care to say anything? If you do, say so.

The Defendant: I still would rather leave it to my attorney, sir.

The Court: Then, Mr. Clerk,—I am going to place you on probation, Mr. Corey, for two years, and I think that is a proper disposition of the case after hearing from the physicians and specialists in the Bureau of Prisons, but there is one thing I would like to say to you. During this probationary period, I wish you would listen to the members of your family, I wish you would take their advice; it would be voluntary on your part. I am not imposing any conditions at all upon you. I want to see you get well. Do you understand me?

The Defendant: Yes, sir.

The Court: And I wish that you would listen to the members of your family and also our Probation Officer, Mr. Griffin. I have gone over the whole case with your brother the Doctor. And they know your case very well.

Pass the order, Mr. Clerk, probation for 2 years.

The Clerk: Benjamin W. Corey, hearken to your sentence as the Court orders it against you. The Court orders that imposition of sentence be suspended and that you be placed on probation for a term of two years.

You will now report to the Probation Officer.

* * * * *

I, A. Joseph Donegan, Official Reporter of the United States District Court, do hereby certify that the foregoing transcript, from pages 1-2 inclusive, constitutes to the best of my skill and ability a true and accurate transcription of my Stenotype notes taken in the above-entitled action.

A. Joseph Donegan
Official Court Reporter